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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RAMIRO ISABEL VALDEZ, Defendant and Appellant.	F074436 (Super. Ct. No. F14904865) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Henry J. Valle, Deputy Attorneys General, for Plaintiff and Respondent.

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Ramiro Isabel Valdez (defendant) stands convicted, following a jury trial, of committing a lewd act on a child (Pen. Code, § 288, subd. (a); counts 1, 4, 5), aggravated sexual assault (rape) of a child (*id*., § 269, subd. (a)(1); count 2), aggravated sexual assault (oral copulation) of a child (*id*., § 269, subd. (a)(4); count 3), sexual penetration of a child 10 years of age or younger (*id*., § 288.7, subd. (b); count 6), and oral copulation with a child 10 years of age or younger (*id*., § 288.7, subd. (b); count 7). As to counts 1, 4, and 5, the jury further found defendant had substantial sexual conduct with a victim under the age of 14 years (*id*., § 1203.066), and that the offense was committed against multiple victims (*id*., § 667.61, subds. (a), (e)(4)). Defendant was sentenced to a total of 135 years to life in prison, and ordered to pay various fees, fines, and assessments.

On appeal, we hold: (1) Defendant is not entitled to reversal based on the trial court's admission of, or jury instruction concerning, evidence of uncharged misconduct (Evid. Code,[1] §§ 352, 1108); (2) Any error concerning the testimony of the nurse who performed sexual assault examinations on the victims was harmless; (3) The trial court did not err in admitting evidence concerning, and the prosecutor did not commit misconduct questioning defendant about, why a social worker went to defendant's home; (4) Any error concerning the exclusion of defense evidence was harmless; (5) Defendant's statement to police was properly admitted; and (6) Defendant is not entitled to reversal based on a theory of cumulative prejudice. Accordingly, we affirm.

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1 Further statutory references are to the Evidence Code unless otherwise stated.

FACTS

I

PROSECUTION EVIDENCE

Victim 1 was born in 2002.[2] She was 13 years old at the time of trial. Defendant was her father. At some point, the family lived in Texas. They then moved to Fresno, where they lived with defendant's mother. The grandmother's house, which was "[s]ort of" a trailer, had three bedrooms, a living room, a kitchen, and two bathrooms. Living there were Victim 1, her four siblings, defendant, the grandmother, and a few of Victim 1's cousins — in all, about 12 people. Defendant, Victim 1, and Victim 1's siblings all slept in one room. Defendant would not let Victim 1 out of her room. She always had to be where he was. He would not allow her to go to school. He did not tell her why he kept her so close to him.

When defendant and Victim 1 were alone in their room, defendant touched Victim 1's vagina. He took off his clothes and told Victim 1 to take off her pants and underwear. He then told her to suck his penis. Victim 1 complied, because she was afraid defendant would hit her if she did not obey. He had previously struck her on the legs with a belt and a hanger, because he wrongly thought she was having sex with her cousins.

On another occasion at the grandmother's house, Victim 1's sister, Victim 2, told Victim 1 that defendant had put his private part in Victim 2's mouth. Victim 2 was shaking and seemed upset.

Victim 1's mother visited the grandmother's house in April. Sometime after, defendant told Victim 1 to pull down her pants. He touched her vagina with his hand and told her to suck his penis.

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[2] For the sake of privacy, we refer to some persons by pseudonyms or initials. No disrespect is intended.

On one occasion, in a room close to the kitchen at "Tia Linda's" house in Fresno, defendant told Victim 1 and Victim 2 to take off their clothes. Victim 1 was afraid he would do something if she did not comply. He made Victim 1 put her hand in Victim 2's vagina and Victim 2 put her hand in Victim 1's vagina, and he made them move their hands around. Defendant then touched Victim 1's vagina with his hand.

Another time at Tia Linda's house, defendant removed Victim 1's clothes and then his own. He touched her vagina and made her touch his penis.

On another occasion in Fresno, defendant told Victim 1 to take off her clothes. When she complied, he put his penis in her vagina and moved his body back and forth. It hurt. Victim 1 did not tell defendant to stop because she was afraid of him. Afterward, defendant gave Victim 1 a pregnancy test to take, because he thought she was pregnant.

When sheriff's deputies first talked to Victim 1 at her grandmother's house, she denied defendant had abused her. She was afraid of being separated from her family. Defendant had told her that if she told someone, they would all be separated and he would be in jail forever. She changed her mind about telling, because she knew it was the right thing to do. She wanted to be with her mother's side of the family in Texas.

Victim 2 was born in 2006. She was nine years old at the time of trial. Defendant abused her. He touched her "[b]ehind." At trial, she could not remember anything else that happened between her and defendant. When police officers talked to her, she also told them about her brother R. hurting her.

Ralph Vigil was the superintendent of the West Park Elementary School District. On May 2, 2014, he conducted a home visit with respect to Victim 1 and two of her siblings, because they had not been attending school. Defendant explained that the children were not in school because he had some medical conditions and was trying to deal with his medication. During the conversation, Victim 1 and one of the other children came out and sat down. Victim 1 was very quiet. At one point, defendant said,

"She's done some bad things." Victim 1 bowed her head and covered her face with her hands.

Vigil told defendant that the children needed to be in school and were subject to being reported to Child Protective Services (CPS), based on neglect, if they were not there on Monday. Defendant said he understood the situation. When the children were not in school on Monday, a report was submitted to CPS concerning possible neglect and abuse. Vigil included abuse because of Victim 1's reaction to defendant's comment. She seemed very scared.

Steven Ridley was a social worker with the Department of Social Services. On May 17, 2014, he met Fresno County Sheriff's Deputies Chalmers and Beggs at a home in the 3300 block of West Church Avenue, because of information that a little girl was heard in the night saying, "No, stop," and that, although she was only 11 years old, she was taking a pregnancy test.

Upon arrival, deputies spoke to a man sitting out front, then another man inside. Victim 1 and Victim 2 were standing on the porch. Victim 1 denied being touched inappropriately by anyone, but she said she did take a pregnancy test her father had bought for her.[3] Victim 1 denied being sexually active. Ridley explained that a doctor could tell whether that was true, then asked if she had had sex with anyone. Victim 1 said no, then maybe. She was crying and evasive.

Ridley and Chalmers then spoke with Victim 2. She said someone had touched her inappropriately, and pointed toward her vaginal area, which she called her "middle."

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[3] Chalmers questioned the children at the same time as Ridley. When Victim 1 was being questioned, she was at the corner of the house, while Victim 2 was by the front door of the residence. When Victim 2 was being questioned, the girls switched positions. They were approximately 50 feet apart.

She said her brother had touched her middle.[4] When Ridley asked if anyone else had done so, she said her father had made her sister and her touch each other's middles. She said her father took the girls' hands and put them on each other. Victim 2 said that one time, her father put his middle in her mouth. She said the next day her throat was very sore and she could not speak. She also said that one night, they were in bed and her father told her to turn around and not look. He and Victim 1 were on the other side of the bed, and Victim 2 did not see what happened. She could feel the bed moving, however.

After talking with Victim 2, Chalmers brought Victim 1 over and told her that he thought she was not being as truthful with him as she should be. He started to reinterview her. She would start to tell a different story, then Victim 2 would correct her. Victim 1 started to cry a bit. She told Chalmers that she was afraid if she told him the truth, she would not be allowed to return to Texas.

Ridley then told Victim 1 what Victim 2 had said about their father making them touch each other. He asked if it was true. She said yes. Victim 1 said it happened at her tia's house. Victim 1 also talked about how one time when she and Victim 2 were sleeping in their father's room with him, he got on top of Victim 1 and put his middle part in her middle part. Victim 1 said it hurt and she told him to stop, but he would not. When she got up, she thought she was bleeding, so she went to the bathroom and "grabbed a pad." This happened at the residence on Church. Victim 1 thought it was in early May 2014. Victim 1 also related that while in Texas, defendant put his middle part in her middle part. She could not recall the exact date, but said it was sometime after they went to his boss's house. The Texas event was first, then the incident at the tia's house, then the incident at the Church residence. Both girls said that if they had a choice, they would rather go with their mother, who lived in Texas.

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[4] It was difficult to understand whether Victim 2 was talking about her father or her brother. Chalmers eventually determined, however, that her brother forced her to suck his penis and rubbed his penis on her buttocks.

Ridley eventually saw defendant, who was sitting on a chair by the porch. Defendant did not make a lot of eye contact. It "seemed like he wasn't there." He was emotionless and had a very flat affect.

Later that day, Sheriff's Detective Galindo interviewed defendant's son at sheriff's headquarters. The son admitted committing a sexual offense.

Galindo then interviewed defendant, also at headquarters. During the interview (an audio-video recording of which was played for the jury), defendant related that he was currently on the medications Seroquel and Remeron. He said the Seroquel was for "like hearing voices mainly." Defendant also related that his wife had visited from Texas in March 2014, and had stayed for about two weeks. Defendant said he kept his daughters in the bed with him because the front door did not stay locked. Sometimes defendant's nephews were there and sometimes their friends, and defendant did not let his daughters sleep in the living room while the boys were out there. In addition, Victim 1 kept doing something with her hands when she was outside and someone was present by the street, even after defendant told her not to.

Defendant expressed surprise over what Victim 1 and Victim 2 said happened. He said that before his wife visited, Victim 1 said somebody on a bicycle took her pants off and touched her between the legs, and that this happened on the side of the trailer. Later, Victim 1 said she was lying.

Defendant initially insisted he did not know why his daughters were making allegations about him. He denied doing anything sexual to them. He admitted having Victim 1 take a pregnancy test; he explained that he did so because after she told him what happened with the person on the bicycle, defendant started wondering if she was sexually active. Also, his "people" would comment that she looked pregnant.

Defendant continued to insist he did nothing sexual with his daughters. Eventually, however, he said he was sorry for what happened. Asked if he made a mistake, he said maybe, when he was using methamphetamine. There was a possibility

he did something he should not have done when he was under the influence, although he knew he did not have sex with the girls. He said maybe he rubbed against them, because he got "stuck" — dazed — sometimes. During those times, he would be motionless. If the girls were saying oral copulation occurred, it was a possibility when he was "stuck." He did not remember. Asked if the girls were lying when they said he touched their vaginas, defendant responded, "If that's what they say. I can't remember everything. I do remember being real messed up when I went to bed." Asked if it was possible they could have orally copulated him, he replied, "It's all possible I guess." He did not remember the sex, but "[a]nything's possible." He felt very bad for what happened and was very sorry for hurting his daughters. He wished he had never started using methamphetamine.

Victim 2 underwent a multi-disciplinary forensic interview on May 23, 2014. During the interview, she did not disclose anything about defendant. She did say, however, that her brother pulled her pants and underwear down and committed a sexual act, and that this occurred inside a bedroom in her grandmother's house.

Victim 1 underwent a forensic interview that same day. She mentioned that defendant made her touch Victim 2's middle part and vice versa, and that this took place at Tia Linda's house.

Jane Salazar was a nurse practitioner in the Child Advocacy Clinic at Valley Children's Hospital. On June 2, 2014, she examined Victim 1 based on a report of sexual abuse. Victim 1 related that she had been sexually assaulted (although she did not use those words) and that she had had penile/vaginal penetration. She said it was with her father, and that it happened in Houston and again in his bedroom in Fresno. She said her sister witnessed this, that her father made her touch his penis, and that he said she could not tell anybody because he would go to jail for a long time.

Salazar conducted a colposcopic examination of Victim 1's genitalia. The genitalia appeared to be normal. This was not unusual, even if there was sexual assault. Salazar also examined Victim 2. Her examination was normal.

Victim 2 underwent a second forensic interview on June 12, 2014. As before, she did not make any statements about defendant molesting her, but she talked about her brother putting his middle part inside her bottom. At the preliminary hearing in October 2014, Victim 2 was crying and emotional during her testimony. She disclosed that defendant touched her middle part underneath her clothing.

Victim 1 also underwent a second forensic interview on June 12, 2014.[5] During this interview (a recording of which was played for the jury), Victim 1 related that her brother was in juvenile hall, because Victim 2 said he put his hand on her bottom. Victim 1 never saw him do anything to Victim 2.

Victim 1 related that her father was in jail because he was doing things to her and her sister. Victim 1 said it happened three times. The first time was in Houston, when Victim 1 was nine years old. Her parents were separated, and she was at defendant's house on a Saturday afternoon at the beginning of the school year. Victim 1 was lying on the bed in defendant's room. She was on her side, and defendant was behind her. Then she was kneeling on the floor while he was standing. He made her suck his middle part.[6]

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5 Galindo scheduled a second interview for both girls because, in light of what they told deputies during the initial contact, as well as information gathered from the interviews of defendant and defendant's son (the girls' brother), Galindo felt there might be more the girls were not disclosing.

David Love, a licensed marriage and family therapist, testified as an expert concerning Child Sexual Abuse Accommodation Syndrome (CSAAS) and neurophysiology of trauma. He explained that child victims often give inconsistent accounts of incidents to different people, have trouble recalling details and dates of events, and may disclose some incidents but omit others when interviewed. Love did not interview any of the people involved in this case or read any of the reports. He was not prepared to say that CSAAS had anything to do with this case.

6 According to Victim 1, boys and girls use their middle parts for urinating.

She then ran outside and threw up. Victim 1 returned to her mother's house, but did not tell what happened for fear her mother would get mad at her.

The second time happened at the Fresno home of Victim 1's grandmother, when Victim 1 was still nine years old. Victim 1's mother visited for two weeks in April, then returned to Houston. Defendant did "stuff" to Victim 1 when her mother left. Victim 1's cousins told defendant to get drunk, then defendant told Victim 1 to suck his middle part. This took place in the grandmother's room. Defendant was lying on the bed. Victim 1's "big" cousins were standing inside the room, looking at defendant. They told Victim 1, who was in the living room, that her father needed her. Defendant then called her in and told her to suck his middle part. She refused. One of the cousins took a picture. Victim 1 went to stay at a friend's house for two weeks. On this occasion, no part of Victim 1's body touched any part of defendant's body.

The third time occurred at the home of Tia Linda, when Victim 1 was 10 years old. Victim 1 and defendant were in defendant's room. Victim 1 first said defendant was lying on his back on the bed. He told Victim 1 to lie on top of him and hold his middle part with her hand. He told her to do it or she would not see her mother. Victim 1 then said defendant was on the floor at the time. He told her to "do it in and out." Also at Tia Linda's house, defendant had Victim 1 touch Victim 2's middle part and vice versa. Victim 1 was nine years old and Victim 2 was five years old.

Victim 1 related that when she was 11 years old, she was doing her homework on the bed in her room. Defendant tried to touch her middle part with his hand. Victim 1 screamed and her mother heard and came and got her. This was in Houston. Victim 1's parents lived in different houses, but the homes were close to each other. Victim 1 then said this happened in Fresno. She said she was forgetting what she was saying, because she did not know what really happened. This was because she could not think about all of it.

II

DEFENSE EVIDENCE

S., who was nine years old at the time of trial, sometimes slept in his father's (defendant's) room at the grandmother's house with his younger brother and his sisters. When the police officers came to his house and asked about good touches and bad touches, he told them nobody had touched him in a bad way. That was true. Other than spankings, he never saw his sisters get touched in a bad way, either by defendant or R.

R. was living in a group home at the time of trial. He admitted a juvenile court petition that alleged he sexually molested Victim 2, because it was true. The molestation took place at his grandmother's house.

A recording of Victim 2's May 23, 2014 forensic interview was played for the jury. In it, Victim 2 said her four-year-old female cousin A. asked Victim 2 to suck A.'s middle part, then A. touched her own middle part. Victim 2 said nobody else was bothering her. She also said nobody had given her a secret touch, which was when someone touched her private parts. In Texas, her sister D. told her to have sex with her stepbrother, but Victim 2 refused. Nothing else like that happened to Victim 2. Victim 2 stated that nothing "nasty" happened to her in Texas or Fresno, and she did not see anything nasty happen to anyone else. Victim 2 also said that she told the police officer that R. had sex with her. He was on top of her, going up and down. He put his middle part in her bottom.

A recording of Victim 1's May 23, 2014 forensic interview was also played for the jury. In it, Victim 1 explained that she was in a foster home because the police came to her house. They came because Victim 2 was heard to say "stop." Victim 1 was not there and did not hear it. When Victim 1 talked to the police, she told them her father put her hand on Victim 2's middle part and Victim 2's hand on Victim 1's middle part. Victim 1 told him to stop and he did. This happened at Tia Linda's house. It was the first time this happened to Victim 1. The next time was at the grandmother's house. Her father told

Victim 2 to put her hand on Victim 1's middle part, but Victim 2 refused and defendant said "okay." The third time, defendant told Victim 2 to do it again, but Victim 1 said no. This again happened at the grandmother's house. Those were the only three times anything happened. Victim 1 said she had never had to use a pad because she was bleeding. Nothing happened to her middle part to make it bleed. Victim 1 denied that defendant ever touched her middle part or that she ever touched his middle part. She denied ever having sex with anyone. She denied that defendant ever put his middle part inside her middle part.

Defendant testified that after his marriage of 12 years broke up, he moved from Houston to Fresno because he lost his job. He brought the five children of the marriage with him. In Fresno, they stayed at his mother's trailer, which was in very poor condition. Defendant's niece and her five children, defendant's mother, two of defendant's nephews, and defendant's sister also lived there. Defendant lived in one of the bedrooms. It had a bed that was a size under queen size. Defendant slept on the floor or on the bed. All his children took turns sleeping on the bed with him. If they were not sleeping on the bed with him, they would be sleeping on couch cushions on the floor in that bedroom. The bedroom door had a latch, but no locking mechanism. When they went to sleep at night, defendant locked himself and his daughters inside the room, because there would be people at the house whom he did not know.

Defendant was unable to find a job. He started to become depressed and began using methamphetamine, probably in late September 2013. His depression worsened, and he attempted suicide in December 2013. As a result, he went into a behavioral center in Fresno. He told the doctors there that he was using drugs and hearing voices. When he left, they gave him prescriptions for Seroquel and Remeron. Defendant found it hard to function on the medications, which "kind of really slowed things down" for him. He would not remember going to sleep. He would just remember waking up, because the medication was so strong. His judgment would be impaired "[t]o a point," with respect

to a lapse of time, that he might sit and stare at something, and a whole hour would go by without him knowing it. His judgment would not be impaired with respect to his actions, however.

Defendant and the children lived at defendant's aunt's house for a couple months, beginning in around January 2014. They stayed in the bedroom near the kitchen. The children did not always sleep in the bedroom with him. Nothing unusual happened. In around February 2014, they all moved back to the home of defendant's mother.

About two weeks before his children's mother came to visit in April 2014, Victim 1 mentioned that a male on the side of the house had tried to take advantage of her. Victim 1 repeated this to other people at the house and to her mother. Defendant debated whether to call the police. He chose not to call, because he was generally paranoid about everything, he was using drugs, and he had called the police to the house too many times. People would joke, but defendant would not interpret what was said as a joke. Instead, he reacted with a sense of danger or fear. A comment was made about Victim 1's weight, and "that's all it took." Defendant started thinking about what if something happened and Victim 1 could be pregnant. To set his mind at ease, he had his sister take him to get a pregnancy test, and he had Victim 1 take it.

In May 2014, CPS took the children.[7] Defendant was on the couch asleep, having just taken both medications, and he thought someone had made a complaint about him having the music too loud. He thought he was going to be told the children were being taken because of the condition of the house. Defendant denied ever having any sexual contact with either girl or making them touch each other.

[7] Prior to this time, Victim 1 never went to live with a friend for two weeks or traveled by herself to her mother's house in Houston.

DISCUSSION

I

ADMISSION OF EVIDENCE

A. Uncharged Acts

Defendant mounts a multifaceted attack on the constitutionality of section 1108, the trial court's admission of uncharged acts pursuant to that statute and section 352, and the trial court's instruction to the jury concerning such evidence. We find no cause for reversal.

1. Background

The People moved, in limine, for admission of evidence of defendant's uncharged acts of molestation of Victim 1 that occurred in Texas. The prosecutor asserted the evidence was admissible pursuant to section 1108 to show propensity to commit the charged offenses, and its probative value outweighed its prejudicial effect within the meaning of section 352. The prosecutor noted Victim 1 referred to such acts in her forensic interview, in addition to which she made disclosures to Jane Salazar, the sexual assault nurse. The court ruled conduct in Texas that was similar to the charged conduct was very probative, would not require a great amount of time to present, and would not confuse jurors; hence, it was admissible. It excluded testimony concerning alleged sodomy in Texas or in Fresno. Because no similar conduct was charged, the court found such evidence overly prejudicial. The court subsequently denied the prosecutor's motion for reconsideration.

Victim 1 subsequently testified that while the family lived in Texas, defendant "put his hand in [her] butt" and touched her vagina. She did not remember how old she was when this happened or how soon after they came to Fresno. Victim 1 testified that nothing else like that happened in Texas. According to Chalmers, however, she disclosed to him that defendant put his middle part in her middle part. She could not remember the exact date, but it was sometime after they went to the house of defendant's boss. In

Victim 1's second forensic interview, she disclosed that the first time something happened with defendant, they were at his home in Houston. Victim 1 was nine years old. She was on the bed in defendant's room and he made her suck his middle part.

During the jury instruction conference, the court stated it would give CALCRIM No. 1191, which was requested by both parties, concerning the evidence of uncharged acts. When the court asked if either party wished to be heard on limiting consideration of the evidence to the purpose of determining defendant's credibility, the prosecutor questioned whether that portion of the instruction applied. The prosecutor noted, however, that defendant testified at trial. Defense counsel then stated she was "having trouble" with the instruction being given at all. The trial court stated it had to give something to the jury regarding consideration of uncharged sexual conduct, whereupon defense counsel stated that if the court was inclined to give the instruction, she had no problem with the proposed language. The court explained that it had added the language about credibility, because defendant testified on direct examination that he never molested Victim 1. Accordingly, jurors could consider Victim 1's testimony concerning acts in Houston as a challenge to defendant's credibility. Defense counsel stated she did not wish to be heard concerning that.

Pursuant to former CALCRIM No. 1191 (see now CALCRIM No. 1191A), the court subsequently instructed the jury:

> "The People presented evidence that the defendant committed the crime of lewd act upon a child in Texas that was not charged in this case. This crime is defined for you in these instructions.
>
> "You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

> "If the People have not met this burden of proof, you must disregard this evidence entirely.
>
> "If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit the sex offenses charged here. If you conclude that the defendant committed the uncharged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the charged sex offenses. The People must still prove each charge and allegation beyond a reasonable doubt.
>
> "Do not consider this evidence for any purpose except for the limited purpose of determining the defendant's credibility."

The court also instructed, inter alia, that jurors could not convict defendant unless the People proved guilt beyond a reasonable doubt; and that whenever the court told jurors that the People must prove something, it meant the People must prove it beyond a reasonable doubt, unless the court specifically told jurors otherwise.

During her summation, defense counsel argued a conviction required proof beyond a reasonable doubt, and that this was higher than the standard of clear and convincing, which was the kind of evidence used to decide, for example, whether to commit one's mother into a nursing home. At the conclusion of closing arguments, the court told jurors:

> "You were provided with the instructions earlier. They were projected here in the courtroom as I read them to you. One of those instructions was CALCRIM 220, which defines the People's burden in this case, proof beyond a reasonable doubt. The other instruction that dealt with a burden of proof, or a standard of proof was CALCRIM 1191, and that dealt with the standard of proof of by a preponderance of the evidence, and that dealt with a specific portion of the evidence in this trial. There is a third standard of proof, which is by clear and convincing evidence. That standard of proof has no applicability whatsoever in this trial. If you have any questions about the standards that do apply here, please see CALCRIM 220 and CALCRIM 1191.

> "You may recall when I read the instruction on CALCRIM 220, there was a portion of the instruction that was not on the board but I included it verbally, and that was where I used the words 'unless I specifically tell you otherwise.' The sentence was, 'Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt.' That is what was shown on the board, but then I added verbally, 'unless I specifically tell you otherwise.' That is the law in this case. And that other portion, 'unless I specifically tell you otherwise,' deals directly with the instruction 1191, the other standard of proof applicable in this particular trial."

During deliberations, jurors sent out a note asking, in part: "IS THE INCIDENT DESCRIBED IN TEXAS BY [VICTIM 1] FALLING UNDER THE CHARGES HERE?" After consultation with counsel, the court responded: "No, Please see CALCRIM 1191 in your jury packet." The court reasoned that jurors were free to believe or disbelieve the evidence, but should not be allowed to wonder why it was presented.

2. Analysis

Generally speaking, section 1101 "prohibits the admission of other-crimes evidence for the purpose of showing the defendant's bad character or criminal propensity." (*People v. Catlin* (2001) 26 Cal.4th 81, 145.) Section 1108 is an express exception to that rule. (§ 1101, subd. (a).) Subdivision (a) of section 1108 provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."

Section 1108 represents a determination by the Legislature "that, in a sex offense prosecution, the need for evidence of prior uncharged sexual misconduct is particularly critical given the 'serious and secretive nature of sex crimes and the often resulting credibility contest at trial' [citation] . . . . By removing the restriction on character evidence in section 1101, section 1108 now 'permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses *for any relevant purpose*' [citation], subject only to the prejudicial effect versus probative value weighing process required by section 352."

(*People v. Britt* (2002) 104 Cal.App.4th 500, 505.) The statute thus "permits evidence of the defendant's commission of 'another sexual offense or offenses' to establish the defendant's *propensity* to commit sexual offenses" (*People v. Medina* (2003) 114 Cal.App.4th 897, 904), and it allows a jury to consider " ' "other sexual offenses as evidence of the defendant's disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense" ' " (*People v. Falsetta* (1999) 21 Cal.4th 903, 912 (*Falsetta*)).

Defendant contends section 1108 violates due process.[8] As he acknowledges, the California Supreme Court has rejected this claim, because section 1108 mandates the exercise of a trial court's discretion to exclude propensity evidence under section 352. (*Falsetta, supra,* 21 Cal.4th at pp. 916-918.) Our state high court has consistently adhered to that holding (*People v. Loy* (2011) 52 Cal.4th 46, 60-61; *People v. Wilson* (2008) 44 Cal.4th 758, 797), and we are bound by those opinions (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).[9]

Defendant also contends section 1108 violates equal protection because it treats those accused of a sexual offense differently from all other criminal defendants. "The

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8 Defendant did not raise constitutionally based objections to the other-acts evidence in the trial court. Nevertheless, he may properly challenge section 1108's constitutionality for the first time on appeal. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 200; see *In re Sheena K.* (2007) 40 Cal.4th 875, 888-889.) He is also permitted to claim admission of the evidence, insofar as assertedly erroneous for the reasons presented to the trial court, had the additional legal consequence of violating the Constitution. (*People v. DePriest* (2007) 42 Cal.4th 1, 19, fn. 6.) Accordingly, because we find his claims sufficiently preserved for appeal, we do not address his assertion that if the claims are not cognizable, trial counsel's failure to preserve them constituted ineffective assistance of counsel.

9 The Ninth Circuit Court of Appeals has upheld, against a due process challenge, a similar federal rule (*U.S. v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1024-1027 [upholding Fed. Rules Evid., rule 414, 28 U.S.C.]), while a lower federal court has concluded the California Supreme Court properly upheld section 1108 (*Rogers v. Giurbino* (S.D.Cal. 2007) 619 F.Supp.2d 1006, 1014-1015).

first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner. [Citation.]" (*In re Eric J.* (1979) 25 Cal.3d 522, 530, fn. & italics omitted.) Defendant makes absolutely no attempt to show those accused of sexual offenses are similarly situated with respect to all other criminal defendants with respect to the legitimate purpose of the law. (See generally *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199, overruled on another ground in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 875, 888; *People v. Wutzke* (2002) 28 Cal.4th 923, 934-944; *Taylor v. San Diego County* (9th Cir. 2015) 800 F.3d 1164, 1169; cf. *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1311.) The analysis does not proceed further absent such a showing. (*People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1384.)

Assuming equal protection analysis is appropriate, however, section 1108 does not infringe on a defendant's constitutionally protected rights, and so, contrary to defendant's contention, only the rational relationship test, and not strict scrutiny, applies. (*People v. Fitch* (1997) 55 Cal.App.4th 172, 184; accord, *Rogers v. Giurbino*, *supra*, 619 F.Supp.2d at p. 1016; cf. *People v. Jennings*, *supra*, 81 Cal.App.4th at p. 1312.) Section 1108 "withstands this relaxed scrutiny. The Legislature determined that the nature of sex offenses, both their seriousness and their secretive commission which results in trials that are primarily credibility contests, justified the admission of relevant evidence of a defendant's commission of other sex offenses. This reasoning provides a rational basis for the law. . . . In order to adopt a constitutionally sound statute, the Legislature need not extend it to all cases to which it might apply. The Legislature is free to address a problem one step at a time or even to apply the remedy to one area and neglect others. [Citation.]" (*People v. Fitch*, *supra*, 55 Cal.App.4th at pp. 184-185.)[10]

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10 Although not expressly holding that section 1108 survives an equal protection challenge, the California Supreme Court quoted *Fitch* with approval on this point in *Falsetta*, *supra*, 21 Cal.4th at page 918.

Defendant further contends section 1108 is unconstitutional as applied to him. This is essentially a claim the trial court did not "sufficiently and properly evaluate[] the proffered evidence under section 352. [Citation.]" (*People v. Holford* (2012) 203 Cal.App.4th 155, 185; cf. *U.S. v. LeMay*, *supra*, 260 F.3d at p. 1026.) " '[O]nly if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process.' [Citation.]" (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384.) Cases in which the admission of evidence will be said to have violated due process and rendered the trial fundamentally unfair are "rare and unusual occasions . . . ." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 232.)

We find neither due process violation nor abuse of discretion, which is the standard by which we review a trial court's rulings on admission of evidence under sections 352 and 1108. (*People v. Merriman* (2014) 60 Cal.4th 1, 58; *People v. Loy*, *supra*, 52 Cal.4th at p. 61; *People v. Harrison* (2005) 35 Cal.4th 208, 230.) Commission of a lewd and lascivious act on a child under the age of 14 constitutes a " '[s]exual offense.' " (§ 1108, subd. (d)(1)(A).) Accordingly, the uncharged acts in this case were admissible under subdivision (a) of section 1108, subject to the trial court's exercise of its discretion under section 352.

Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Under this statute, "the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v.*

Rodrigues (1994) 8 Cal.4th 1060, 1124-1125.) Stated another way, "discretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

Where evidence proffered pursuant to section 1108 is concerned, "[t]he evidence is presumed admissible and is to be excluded only if its prejudicial effect *substantially* outweighs its probative value in showing the defendant's disposition to commit the charged sex offense or other relevant matters. [Citation.]" (*People v. Cordova* (2015) 62 Cal.4th 104, 132, italics added; accord, *People v. Holford*, *supra*, 203 Cal.App.4th at p. 167.) " 'The "prejudice" referred to in . . . section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352, "prejudicial" is not synonymous with "damaging." ' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) Thus, evidence should be excluded as unduly prejudicial " 'when it is of such nature as to inflame the emotions of the jury, motivating [jurors] to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' [Citation.]" (*People v. Escudero* (2010) 183 Cal.App.4th 302, 310.)

"The weighing process under section 352 'depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules.' [Citation.]" (*People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1105.) Nevertheless, the California Supreme Court has decreed that trial judges must consider factors such as the uncharged sex offense's "nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the

defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. [Citations.]" (*Falsetta, supra,* 21 Cal.4th at p. 917.) The amount of time involved in introducing and refuting the evidence is also an appropriate consideration. (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

With respect to probative value, "evidence of a 'prior sexual offense is indisputably relevant in a prosecution for another sexual offense.' [Citation.]" (*People v. Branch*, *supra*, 91 Cal.App.4th at pp. 282-283.) Here, if jurors determined Victim 1 was credible, the uncharged offenses to which she testified had at least some tendency in reason to show the charged acts were not mistakes or accidents, and that defendant's denial of molesting his daughters lacked credibility.[11]

Defendant disputes this, and argues the uncharged acts had no probative value, because they were unadjudicated, uncorroborated, and supported only by Victim 1's own testimony. (See *People v. Stanley* (1967) 67 Cal.2d 812, 817 [where basic issue in case is veracity of complaining witness and defendant concerning commission of charged acts, trier of fact is not aided by evidence of other offenses where said evidence is limited to uncorroborated testimony of complaining witness]; but see *People v. Ewoldt* (1994) 7 Cal.4th 380, 407-408 [*Stanley*'s observation was based on incorrect premise that sole purpose in admitting evidence of uncharged misconduct is to corroborate testimony of complaining witness; such evidence properly may be admitted to prove any fact material to prosecution's case].)

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11 " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.)

People v. Ennis (2010) 190 Cal.App.4th 721 is on point. In that case, Ennis was charged with, inter alia, sexual offenses against C. that were committed in California. Pursuant to section 1108, the trial court permitted the jury to hear evidence of uncharged sexual offenses he committed against C. in Arizona. (*Ennis*, *supra*, at pp. 726, 728, 732.) On appeal, Ennis claimed the uncharged acts were unduly prejudicial, primarily because the evidence had almost no probative value. (*Id*. at p. 733.) The appellate court rejected this contention, stating:

> "Admittedly, the probative value seems slight. While evidence the defendant has committed other, similar, crimes is always probative due to its suggestion he has a propensity toward that type of crime, when such evidence comes in a child molestation case, from the same witnesses who supplied the evidence of the charged crimes, and amounts to evidence that the defendant molested the child even more times than he was charged with, it wouldn't seem to advance the ball in any meaningful way. None of the evidence about the alleged Arizona crimes fills in any missing pieces about what happened in California; nor, since the evidence comes from the same source as the evidence about the California crimes, does it corroborate that California evidence in any significant way.
>
> "Nonetheless, we conclude the contention that the prejudicial impact of this evidence *substantially* outweighed the probative effect is unpersuasive. Stated simply, we reject the assertion the challenged evidence about the Arizona crimes had any significant 'prejudicial' effect, as that word is used in . . . section 352. [¶] . . . [¶]
>
> "In this case, we are confident that whatever 'emotional bias' the Arizona evidence might have tended to invoke against Ennis was nugatory, given the substantially identical evidence offered regarding the California crimes which were actually at issue. Nothing about the uncharged Arizona crimes made Ennis look significantly worse, or made his alleged conduct in California appear significantly more egregious, than it already did. . . .
>
> "Further, nothing about the Arizona evidence made the California evidence look substantially more credible than it would have otherwise. If the jury was not inclined to believe that C. had told the police about what happened to her in California . . . , and what [another witness] testified to at trial about what happened . . . in California, it's difficult to imagine how

> hearing additional evidence from the same sources, about similar crimes committed against C. in Arizona, would change anything. . . .
>
> "In the circumstances of this case, we reject the contention the prejudicial effect of allowing the jury to hear of Ennis's uncharged acts of sexual molestation in Arizona substantially outweighed the probative value of that evidence. The court did not err in admitting it." (*People v. Ennis*, *supra*, 190 Cal.App.4th at pp. 733-735.)

We reach the same conclusion here. The trial court was not required to find the presumption in favor of admissibility was overcome. (See *People v. Loy*, *supra*, 52 Cal.4th at p. 62.) The uncharged acts were not more inflammatory than the charged offenses, the evidence was presented quickly and without irrelevant detail, and the uncharged acts were not remote in time. (See *ibid*.; *People v. Wilson*, *supra*, 44 Cal.4th at pp. 797-798.) Although defendant was never punished for the uncharged acts, a fact that can heighten prejudicial effect (see *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405), this did not render the evidence substantially more prejudicial than probative. Significantly, the evidence "did not encourage the jury to prejudge defendant's case based upon extraneous or irrelevant considerations. [Citation.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 853.)

The trial court acted well within its broad discretion in admitting the challenged evidence. Since the evidence was admitted for a permissible purpose and its exclusion was not compelled by section 352, admission did not violate defendant's due process or other constitutional rights. (*People v. Holford*, *supra*, 203 Cal.App.4th at p. 180; see *People v. Rogers* (2013) 57 Cal.4th 296, 332; *People v. Foster* (2010) 50 Cal.4th 1301, 1335.)

Nor did the trial court err by instructing on propensity and credibility pursuant to former CALCRIM No. 1191. The court properly determined the jury needed guidance with respect to evaluating the uncharged misconduct. Defendant argues, however, that the instruction was the "practical equivalent" of instructing on propensity based on other charged offenses proved by a preponderance of the evidence, something he views as

"circular bootstrapped reasoning [that] is fundamentally unfair" and poses an "obvious" risk of confusing jurors, since they are asked to apply to different standards of proof to similar classes of evidence.[12] Defendant also contends the instruction posed "a real risk" of reducing the prosecution's burden of proof, and that the instruction "amounted to an irrational permissive inference of ultimate guilt by affording jurors a fallacious and circular means of resolving the ultimate issue in the case, namely credibility . . . ." We disagree.

"The Due Process Clause requires the government to prove a criminal defendant's guilt beyond a reasonable doubt, and trial courts must avoid [instructing in such a way] as to lead the jury to convict on a lesser showing than due process requires." (*Victor v. Nebraska* (1994) 511 U.S. 1, 22.) "The constitutional question . . . is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the [beyond-a-reasonable-doubt] standard." (*Id*. at p. 6.) Thus, " '[a] defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant. [Citations.]' [Citation.] ' "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." [Citations.]' [Citation.]" (*People v. Solomon* (2010) 49 Cal.4th 792, 822; accord, *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Jablonski* (2006) 37 Cal.4th 774, 831.) Moreover, in assessing whether jury instructions were erroneous, a reviewing court must

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12 In support of his argument, defendant cites *People v. Quintanilla* (2005) 132 Cal.App.4th 572, certiorari granted and judgment vacated on another ground *sub nom. Quintanilla v. California* (2007) 549 U.S. 1191. In *Quintanilla*, the appellate court held it was error to permit jurors to draw a propensity inference from charged domestic violence offenses under section 1109, section 1108's domestic violence counterpart. (*Quintanilla*, *supra*, 132 Cal.App.4th at p. 579.) The California Supreme Court has disapproved *Quintanilla* on this point. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1163, fn. 5 (*Villatoro*).)

" ' " 'assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]" ' [Citations.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148-1149, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Former CALCRIM No. 1191 is constitutional and correctly states the law. (*People v. Reliford* (2003) 29 Cal.4th 1007, 1012-1016 [discussing CALJIC No. 2.50.01, former CALCRIM No. 1191's counterpart]; *People v. Johnson* (2008) 164 Cal.App.4th 731, 739-740; see *Villatoro*, *supra*, 54 Cal.4th at p. 1160.) As did the California Supreme Court in *Reliford*, "[w]e . . . reject the . . . assertion that the instruction, even if correct, is too 'complicated' for jurors to apply. This is not the first time jurors have been asked to apply a different standard of proof to a predicate fact or finding in a criminal trial. [Citations.] As we do in each of those circumstances, we will presume here that jurors can grasp their duty — as stated in the instructions — to apply the preponderance-of-the-evidence standard to the preliminary fact identified in the instruction and to apply the reasonable-doubt standard for all other determinations." (*Reliford, supra,* 29 Cal.4th at p. 1016.)

Defendant cites us to *People v. Cruz* (2016) 2 Cal.App.5th 1178 (*Cruz*) and *People v. Gonzales* (2017) 16 Cal.App.5th 494 (*Gonzales*). These cases do not assist him.

In *Cruz, supra,* 2 Cal.App.5th 1178, this court found a lowered burden of proof, resulting in structural error, where jurors were permitted to find *charged* offenses true by a preponderance of the evidence and then use those findings to infer the defendant had a propensity to commit other charged sex offenses. (*Id*. at pp. 1180, 1184.)[13] We reasoned: "In effect, the instruction given here told the jury it should first consider

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13 In *Villatoro,* the California Supreme Court found no lowered burden of proof where the modified version of former CALCRIM No. 1191 given at trial told jurors that *all* offenses must be proven beyond a reasonable doubt, even those used to draw an inference of propensity. (*Villatoro, supra,* 54 Cal.4th at pp. 1167-1168.)

whether the offenses charged in counts 1, 2, and 3 had been established by a preponderance of the evidence, while holding its ultimate decision on the same offenses in suspension. Then the jury was required to decide whether the preponderance finding showed a propensity, and whether this propensity, in combination with the other evidence, proved those offenses a second time, this time beyond a reasonable doubt." (*Cruz, supra,* at pp. 1185-1186.) We found the task "logically impossible" for lay jurors, and concluded that, "for practical purposes, the instruction lowered the standard of proof for the determination of guilt." (*Id.* at p. 1186.)

In the present case, unlike *Cruz,* jurors were permitted to find only *uncharged* acts by a preponderance of the evidence. As given, former CALCRIM No. 1191 so stated, and counsels' summations contained no suggestion charged acts could be used to show propensity. We recognize the evidence of the uncharged acts was identical to the evidence of the charged offenses. It is precisely for this reason we reject the notion jurors might have found the uncharged acts true by a preponderance of the evidence, then used propensity as a circumstance supporting guilt beyond a reasonable doubt of the charged offenses, thereby lowering the prosecution's burden of proof as to the charged offenses. Considering the evidence and instructions as a whole in this case, it is simply unreasonable to believe any juror reasoned, *I don't know if Victim 1 is credible, but I think defendant probably committed the uncharged acts, so he has a propensity for molesting children, and so he definitely committed the charged acts*.

In *Gonzales, supra,* 16 Cal.App.5th 494, the victim of the charged sex offenses recounted uncharged sex offenses the defendant committed against her. (*Id.* at p. 496.) On appeal, the defendant claimed that giving former CALCRIM No. 1191 improperly allowed the victim to corroborate her own testimony. (*Gonzales, supra,* at p. 500.) Two justices rejected the claim, concluding that since the evidence was admissible for the purposes stated in former CALCRIM No. 1191, former CALCRIM No. 1191 correctly instructed the jury. (*Gonzales, supra,* at p. 501.) They noted that section 1108 is not

limited to the testimony of third parties, and found nothing irrational about a victim supporting his or her own testimony with testimony of uncharged sexual offenses. Although agreeing such testimony is not as probative as similar testimony from a third party, they found it probative nonetheless. (*Gonzales*, *supra*, at p. 502.) They also rejected the claim the instruction likely resulted in the jury misapplying the burden of proof for the charged offenses, noting former CALCRIM No. 1191 told jurors the uncharged offenses were only one factor to consider, they were not sufficient by themselves to prove the defendant was guilty of the charged offenses, and the People must still prove the charged offenses beyond a reasonable doubt. (*Gonzales*, *supra*, at p. 502.)

The concurring justice found the instruction to have been erroneous and to have required an "exercise in 'mental gymnastics' " from the jurors: "[The victim's] credibility was the core of the proof establishing [the defendant's] guilt. The jury was instructed, however, that it only had to be satisfied by a preponderance of the evidence of [the victim's] veracity to prove the commission of the uncharged offenses in order to prove the charged offenses, even if not satisfied beyond a reasonable doubt of the commission of the uncharged offenses." (*Gonzales*, *supra*, 16 Cal.App.5th at p. 506 (conc. opn. of Perren, J.).) The error in giving the instruction was harmless, however, because the instruction did not lower the standard of proof for the determination of guilt. It made clear that the charged offenses had to be proven beyond a reasonable doubt, the evidence supporting the charged offenses was substantial, and the victim's testimony "bore hallmarks of credibility" and was corroborated by her mother and another witness. (*Id*. at p. 507 (conc. opn. of Perren, J.).)

Were we to agree with the foregoing analysis, we would similarly find defendant was not prejudiced by the giving of former CALCRIM No. 1191. The instructions and arguments of counsel made clear the charged offenses had to be proven beyond a reasonable doubt. Moreover, it bears repeating: Victim 1 either was credible as to all

acts to which she testified, or she was not credible as to any. Jurors were told to consider all the instructions together. Under the circumstances of this case, when former CALCRIM No. 1191 is considered with the court's other instructions, it simply is unreasonable to conclude any juror found Victim 1 probably credible with respect to the uncharged acts and so found defendant had a propensity to molest children, and as a result found Victim 1 definitely credible with respect to the charged acts.

As a result, we reject the notion the instruction given amounted to an irrational permissive inference of guilt. (See *Hanna v. Riveland* (9th Cir. 1996) 87 F.3d 1034, 1037.) We also reject any suggestion the trial court erred by permitting the jury to consider the uncharged acts in determining defendant's credibility. The case was a credibility contest between defendant and his daughters. He denied ever molesting them. As the California Supreme Court has stated, "section 1108 was intended in sex offense cases to relax the evidentiary restraints section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's *and the defendant's* credibility." (*Falsetta, supra*, 21 Cal.4th at p. 911, italics added.)

B. <u>The Nurse's Testimony</u>

As summarized in the statement of facts, *ante*, nurse Jane Salazar examined both victims in response to a report of sexual abuse. Defendant now challenges the trial court's rulings concerning (1) Salazar's recounting of Victim 1's statements reporting sexual abuse, and (2) Salazar's testimony about injury/healing rates for estrogenized hymens. Defendant says his mistrial motion should have been granted, and his rights to due process, a fair trial, and confrontation were violated. We conclude any error was harmless.[14]

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[14] The Attorney General does not contend defendant's claims have been forfeited. Because we agree defendant's claims were sufficiently preserved for appeal, we do not

1. Background

The People moved, in limine, to have Salazar testify as an expert. They asserted her training and experience enabled her to render opinions as to medical findings that were sufficiently beyond common experience, and that her opinions would assist the jury in understanding physical findings or lack thereof relating to sexual trauma and abuse. When the trial court asked to what Salazar would be called to testify, the prosecutor responded Salazar would testify to the disclosures Victim 1 made to her about sexual molestations by defendant, and the fact the absence of physical findings during the examination was not inconsistent with sexual molestation and even vaginal rape. Defense counsel responded: "I don't know . . . what her education level is. I know that she does these SART exams. But as long as he can lay the foundation that she is an expert in how a penis can . . . penetrate without damaging a hymen and then . . . how statistically that could happen, and if it does happen, why. I don't think she should be allowed to testify to that. I think we're getting pretty far out there, out of her expertise, which is SART exams . . . ." The trial court ruled that if a foundation was laid, there was no issue with Salazar's ability to testify on certain issues that might come up during the course of the trial, and that those issues should be addressed as they arose.

Salazar subsequently testified she had been a nurse practitioner in the Child Advocacy Clinic of Valley Children's Hospital for a little more than three and one-half years. Prior to that, she was a head nurse in the Pediatric Intensive Care Unit and Sedation Center at Tripler Army Medical Center in Hawaii, and she was also a consultant on sexual abuse cases for the military. Prior to that, she worked at Kapiolani Child Protection Center, which was similar to the clinic at which she currently worked. Prior to that, she worked for Child Protection Services in Los Angeles. She had worked in the

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address his assertion that if the claims are not cognizable, trial counsel's failure to preserve them deprived defendant of the effective assistance of counsel.

Violence Intervention Program at County USC Medical Center in the child abuse clinic, and spent 23 years as an ICU nurse in the pediatric critical care unit at Harbor UCLA Medical Center. She had a master's degree in nursing and was certified by the state as a family nurse practitioner. Although she had testified in court as an expert less than 20 times, she had performed close to 3,000 sexual assault examinations. Without objection, the prosecutor proffered her as an expert in the field of forensic medical examinations.

Salazar testified that she examined Victim 1 on June 2, 2014, based on a report of sexual assault. Salazar went over Victim 1's medical history with Victim 1, then asked if Victim 1 knew why she was there. Salazar had no personal recollection of what Victim 1 said about why she was there, other than the notes Salazar wrote in Victim 1's medical chart. Salazar had a duty to record accurately what patients told her, and she made the record about the same time the patients gave her the information.

Without asking direct questions, Salazar elicited from Victim 1 that Victim 1 "was sexually assaulted, not in those words, that she already had penile/vaginal penetration." Using her notes to refresh her memory, and over defendant's hearsay objection, Salazar testified Victim 1 said it was with her father, in Houston and then in her father's bedroom in Fresno. Victim 1 said her sister witnessed this, and that her father vaginally penetrated her and made her touch his penis. He said she could not tell anybody because he would go to jail for a long time.

Salazar's physical examination of Victim 1 included a colposcopic examination of the genitalia, which appeared to be normal. Over defendant's relevance objection, Salazar testified this was not unusual. She explained that 97 to 98 percent of children who came to her with sexual assault histories have no findings. As far as Victim 1 was concerned, she was at an age when she had started to "get some estrogen onboard," along with related changes in her hymen. As estrogen affects the hymen, the hymen becomes thicker and stretchy. A hymen with no estrogen tears a little easier, depending on the

type of force used and the depth of penetration. Victim 1's hymen was normal. This was normal, even in cases of sexual assault.

Salazar also examined Victim 1's mouth. She found nothing related to sexual trauma. This was not surprising, because very few oral copulations cause trauma to the mouth, again depending on the force used. Moreover, approximately a month had passed between the time of the sexual assault and the examination. Even if Victim 1 had had findings, whether oral or vaginal, they would not have been present a month later.

On cross-examination by defense counsel, the following took place:

"Q So what you are saying is that both girls had intact hymens?

"A That's correct.

"Q Statistically, what is the percentage of women who have vaginal sex, penile to vaginal sex and maintain an intact hymen?

"A I couldn't tell you, but I know that I've seen them. [¶] . . . [¶]

"Q Do you know statistically the amount of confirmed vaginal/penile contact and intact hymens?

"A I can only tell you what I see in my practice.

"Q Have you seen any national studies?

"A Oh, I've seen many.

"Q Okay. Are you relying on any of those studies to form your opinion today?

"A Uh, I'm basing it on studies that I've read in the past and my own practice and experience in the field, yes.

"Q Okay. So what are those studies that you are relying on?

"A I couldn't tell you off the top of my head.

"Q Okay.

"A But there are many. [¶] . . . [¶] . . . There are many studies done.

"Q Studies done. But you don't know any of those studies?

"A I couldn't tell you off the top of my head, no.

"Q Okay. So have you seen girls this age come in without intact hymens?

"A Yes.

"Q And they have the estrogenized hymens?

"A Uh, some do, yes.

"Q So what you are saying in all that is these girls had no findings?

"A That is exactly right." (Boldface omitted.)

At the conclusion of cross-examination, defense counsel elicited that Salazar had no independent recollection of seeing Victim 1 and Victim 2, and was relying completely on her notes. Counsel's objection, that Salazar's testimony was hearsay, was overruled. The court then elicited that Victim 1 did not use the words "sexually assaulted" or "penile/vaginal penetration," that those were Salazar's words, and that Salazar did not recall the words Victim 1 actually used. Salazar further testified that she did not include Victim 1's exact words in her notes.

Defense counsel subsequently asked, outside the presence of the jury, that Salazar's entire testimony be stricken. Counsel argued that Salazar based her theories on statistical anomalies but did not know the studies upon which she relied. Counsel also argued Salazar did not know the amount of vaginal-to-penile confirmed hymen-intact patients she actually saw, yet stated it as a fact with no national studies to support it. Counsel moved for a mistrial on the ground Salazar testified to hearsay statements of which she had no independent recollection. The prosecutor agreed it would be appropriate to have an instruction that limited the paraphrased statements to consideration not for their truth, but as information Salazar relied upon in forming her opinions. This ensued:

"THE COURT: The difficulty the Court has is . . . this witness's testimony is being allowed as a hearsay exception, possibly under Evidence Code section 1360, possibly under Evidence Code section 1253, and possibly as a prior inconsistent or a consistent statement. So it appeared to the Court that it was very important if this witness is testifying to hearsay statements that she provide an accurate statement of the actual words used by the declarants in this case . . . .

"The Court understands the point made by [defense counsel] about the statistical support for her conclusions. In this Court's mind, that is not the gist of this testimony. She can testify as an expert, and it is clearly based upon her experience and her training. She would constitute an expert for purposes of Evidence Code section, I believe it is 801. She can clearly speak about the statistics, if she is asked about the statistics. She recited those statistics based on her personal experience, as well as studies, but she could not cite the studies, she made it clear she could not do that off the top of her head. But it appeared that she relied more on her own experiences in the examinations she has done.

"So the bottom line, I don't think this case is going to rise or fall on the statistics. So . . . I'm going to have to deny your request for a mistrial on that basis. More importantly is the language, the words that were used.

"[DEFENSE COUNSEL]: Well, I have a standing hearsay objection there, because it is not within an exception. And under 352, it would be far more prejudicial than probative if you let [the witness's paraphrases] in for the purpose that the D.A. suggests. [¶] . . . [¶]

"THE COURT: The Court is inclined to give a limiting instruction for this witness, since this witness was unable to give the language that was actually used by the declarants in this case. That limiting instruction would be under CALCRIM 362, which reads in part, as follows: 'In this case Jane Salazar testified that in reaching her conclusions as an expert, she considered statements made by [Victim 1] and [Victim 2], specifically, referring to the statements about . . . why they were each there to see her, meaning Ms. Salazar. You may consider those statements only to evaluate the expert's opinion.' And the opinion in this case would be whether these alleged victims actually suffered sexual assault, in our terms sexual assault or vaginal penetration. 'Do not consider those statements as proof that the information contained in the statements is true.'

"Either counsel wish to be heard?

"[DEFENSE COUNSEL]: Your Honor, I don't think it can be cured by a limiting instruction. [¶] . . . [¶] . . . I think that they're going to take it for the truth of the matter asserted therein. And you can't cure it with a limiting instruction. Because . . . you've got her certified as an expert on studies that don't exist and . . . now she is testifying to words that she's not sure of, because she doesn't have any independent recollection, that are paraphrased into her own language. And a limiting instruction does not cure that. How do you explain that to the jury, to take that as the evidentiary proof and weight that that is, which is very low? I mean, the statistics — she doesn't have any recollection.

"THE COURT: The presumption of the law is that the jurors follow the instructions of the Court. And the Court does not believe that the jurors will have any difficulty in following this particular instruction. [¶] . . . [¶] . . . [T]he Court believes that CALCRIM 360 being given to the jurors would cure any misunderstanding as to the language that was actually used by the declarants in this case.

"I would also add that it is my understanding that each of you intends to produce other witnesses to whom these declarants made statements, which would make it very clear that these alleged victims did not use the words 'sexually assaulted' or 'penile/vaginal penetration.' It is very clear from what this witness has testified to up to this point that she is using her words, not theirs. And frankly, I believe the jurors having heard from these declarants directly in open court are pretty well aware that they did not use the words 'sexually assaulted' or 'penile/vaginal penetration.' So the motion for a mistrial is denied."

With the concurrence of both counsel as to the language of the instruction,[15] and before Salazar left the witness stand, the trial court told the jury: "Jane Salazar testified that in reaching her conclusions as an expert witness, she considered statements made by [Victim 1]. I'm referring only to the statements made by [Victim 1] about why she and [Victim 2] were meeting with Jane Salazar. You may consider those statements only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in the statements is true."

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15 Defense counsel continued to maintain her position that the problem could not be cured by a limiting instruction.

During the general instructions at the conclusion of the evidentiary portion of trial, the court told the jury: "A witness was allowed to testify as an expert and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert's knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. *You must decide whether information on which the expert relied was true and accurate*. You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence." (Italics added.) The court also repeated the admonishment it gave at the time Salazar testified, including that jurors were not to consider the statements of the victims concerning why they were meeting with Salazar "as proof that the information contained in the statements is true."

2. Analysis

a. *Victim 1's statements to Salazar*

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (§ 1200, subd. (a).) Where hearsay is "testimonial," its admission violates a defendant's federal constitutional right of confrontation unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine him or her. (*Crawford v. Washington* (2004) 541 U.S. 36, 59, 68-69 (*Crawford*).)

We assume Victim 1's statements to Salazar were testimonial within the meaning of *Crawford*. (See *Davis v. Washington* (2006) 547 U.S. 813, 822; *Crawford, supra*, 541 U.S. at pp. 51-52; *People v. Vargas* (2009) 178 Cal.App.4th 647, 653-654, 660-662.) Defendant's confrontation rights were not violated by their admission, however, because Victim 1 testified at trial and thus was subject to cross-examination. (*People v. Bryant,*

Smith and Wheeler (2014) 60 Cal.4th 335, 413.) Accordingly, we turn to the propriety of their admission under state law.

"Except as provided by law, hearsay evidence is inadmissible." (§ 1200, subd. (b).) Section 1253 sets out an exception the Attorney General says is applicable here. That statute provides, in pertinent part: "Subject to Section 1252, evidence of a statement is not made inadmissible by the hearsay rule if the statement was made for purposes of medical diagnosis or treatment and describes medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. This section applies only to a statement made by a victim who is a minor at the time of the proceedings, provided the statement was made when the victim was under the age of 12 describing any act, or attempted act, of child abuse or neglect." Pursuant to section 1252, such a statement is inadmissible "if the statement was made under circumstances such as to indicate its lack of trustworthiness."

Had Salazar been able to recall Victim 1's exact statements (with or without the assistance of the notes she made at the time of the examination), we have little doubt Victim 1's statements would have been admissible for their truth pursuant to section 1253. This is so even with respect to Victim 1's identification of defendant as her abuser. (*People v. Brodit* (1998) 61 Cal.App.4th 1312, 1331; accord, *In re Daniel W.* (2003) 106 Cal.App.4th 159, 165.) Although Victim 1's statements were not spontaneous, they were not shown to have been made under circumstances indicating a lack of trustworthiness. (See *People v. Brodit*, *supra*, 61 Cal.App.4th at p. 1332; see generally *People v. Riccardi* (2012) 54 Cal.4th 758, 821-822, overruled on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216; *People v. Spencer* (1969) 71 Cal.2d 933, 946-947.)

We assume, without deciding, that section 1253 did not permit admission of Victim 1's statements for their truth under the circumstances of this case. The trial court gave an instruction limiting their consideration to the purportedly nontruth purpose of

evaluating Salazar's expert opinion. As the California Supreme Court recognized not long after defendant's trial, however, "When an expert is not testifying in the form of a proper hypothetical question and no other evidence of the case-specific facts presented has or will be admitted, . . . such facts are being considered by the expert, and offered to the jury, as true. . . . [¶] Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth. If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*People v. Sanchez* (2016) 63 Cal.4th 665, 684, fn. omitted (*Sanchez*).) "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. . . . There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception. [¶] What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id*. at pp. 685-686.)

The Attorney General says the facts in issue were independently proven by Victim 1's and Victim 2's testimony; hence, Salazar was permitted to relate them to the jury as the basis for her opinion. Defendant disputes this on the ground that while similar statements were given on other occasions, there was no independent witness to these same statements on the same occasion. We believe the Attorney General has the better position.

Assuming error, however, we find it harmless. As previously stated, there was no confrontation clause violation, because Victim 1 testified at trial and was subject to cross-examination. For much the same reason, we find no due process violation. In light of Victim 1's testimony, admission of her statements to Salazar simply did not render the trial fundamentally unfair. (See *People v. Partida* (2005) 37 Cal.4th 428, 439; *People v. Albarran*, *supra*, 149 Cal.App.4th at pp. 229-230.) This being the case, "[t]he erroneous admission of expert testimony only warrants reversal if 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.]" (*People v. Prieto* (2003) 30 Cal.4th 226, 247, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836; see *Sanchez*, *supra*, 63 Cal.4th at p. 685.) Given the evidence presented at trial, it is simply not reasonably probable the jury would have reached a different result had Victim 1's statements to Salazar been excluded. (See *People v. Whitson* (1998) 17 Cal.4th 229, 251.)

b. *Testimony concerning estrogenized hymens and related matters*

Defendant contends the trial court erred by admitting Salazar's opinions concerning hymenal injuries and recovery "without adequate foundation in expertise."

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates." (*People v. Bloyd* (1987) 43 Cal.3d 333, 357; see § 720, subd. (a).) "Whether a person qualifies as an expert in a particular case . . . depends upon the facts of the case and the witness's qualifications. [Citation.]" (*People v. Bloyd*, *supra*, at p. 357.) " 'The competency of an expert is relative to the topic and fields of knowledge about which the person is asked to make a statement. In considering whether a person qualifies as an expert, the field of expertise must be carefully distinguished and limited.' [Citation.]" (*People v. Kelly* (1976) 17 Cal.3d 24, 39; see *People v. Hogan* (1982) 31 Cal.3d 815, 853, disapproved on another ground in *People v. Cooper* (1991) 53 Cal.3d 771, 836.)

"The qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court. [Citations.] That discretion is necessarily broad . . . . Absent a manifest abuse, the court's determination will not be disturbed on appeal. [Citations.]" (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175.) "The trial court's ' "decision will not be reversed merely because reasonable people might disagree." ' " (*Polanski v. Superior Court* (2009) 180 Cal.App.4th 507, 537.) " ' "Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility." ' [Citation.]" (*People v. Bolin, supra,* 18 Cal.4th at p. 322.)

In light of the " 'considerable latitude' " afforded a trial court in determining the qualifications of an expert (*People v. Cooper, supra,* 53 Cal.3d at p. 813), we cannot say the trial court abused its discretion in permitting Salazar to testify as an expert concerning estrogenized hymens and related topics. "Error regarding a witness's qualifications as an expert will be found only if the evidence shows that the witness ' " '*clearly lacks* qualification as an expert.' " ' [Citation.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 162.) Here, Salazar had extensive experience conducting sexual assault examinations, in addition to her nursing degree and certificate. Under the circumstances, the trial court properly allowed her to testify as an expert, even with respect to hymenal injuries and recovery. (See *People v. Nelson* (2016) 1 Cal.5th 513, 537.) Questions concerning the credibility of her knowledge and reliability of her testimony were explored at length before the jury, and went to the weight of the evidence rather than its admissibility. (*Ibid.*; *People v. Merriman, supra,* 60 Cal.4th at p. 57; *People v. Bolin, supra,* 18 Cal.4th at p. 322; see *People v. Eubanks* (2011) 53 Cal.4th 110, 143; *People v. Richardson* (2008) 43 Cal.4th 959, 1004.)

"It is settled that a trial court has wide discretion to exclude expert testimony . . . that is unreliable. [Citations.]" (*People v. McWhorter* (2009) 47 Cal.4th 318, 362.) The trial court did not abuse its discretion by allowing Salazar's testimony to go to the jury.

As the court observed, Salazar's testimony and opinions were based primarily on her own observations and experience, rather than on studies. (See *People v. Nguyen* (2015) 61 Cal.4th 1015, 1034.)

c. *Denial of defendant's mistrial motion*

"A motion for mistrial is directed to the sound discretion of the trial court." (*People v. Jenkins* (2000) 22 Cal.4th 900, 985.) Accordingly, in reviewing a trial court's ruling on such a motion, we apply the deferential abuse-of-discretion standard. (*People v. McLain* (1988) 46 Cal.3d 97, 113.) We will not reverse unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*People v. Bryant, Smith and Wheeler*, *supra*, 60 Cal.4th at p. 390.)

"A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) A motion for mistrial properly may be refused where the trial court is satisfied that no injustice has resulted or will result from the occurrences of which the party complains. (*People v. Eckstrom* (1986) 187 Cal.App.3d 323, 330; *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 548.)

The trial court properly denied the defense motion insofar as it rested on admission of Salazar's testimony concerning hymenal injuries and related topics. Its rulings with respect to Victim 1's statements to Salazar fell within the law as it stood at the time of trial (see, e.g., *People v. Montiel* (1993) 5 Cal.4th 877, 919), but arguably constituted error under *Sanchez*, which disapproved *Montiel* on this point (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13). Nevertheless, "the trial court did not abuse its discretion in denying a motion for a mistrial. Whether or not the introduction of such evidence [constituted error], it was not prejudicial, that is, it is not reasonably probable

that a result more favorable to defendant would have resulted absent admission of this evidence. [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 749-750.)[16]

C. The Voice in the Night

Defendant contends the trial court erred in admitting case-specific testimonial hearsay about a voice that was heard in the night and a child being made to take a pregnancy test. He further says the error was compounded by prosecutorial misconduct. We conclude the trial court did not err, any claim of prosecutorial misconduct was forfeited by failure to object on that ground at trial, and defendant was not deprived of the effective assistance of counsel because no misconduct occurred in any event.

1. Background

As described in the statement of facts, *ante*, Steven Ridley was a social worker who responded to defendant's home on May 17, 2014. During direct examination by the prosecutor, the following occurred:

> "Q And why did you go out there?
>
> "A We received information that there may have been a possible situation where a little girl who was making statements that —
>
> "[DEFENSE COUNSEL]: I'm going to object as to hearsay. And foundation.
>
> "THE COURT: Overruled, in that the question was, 'Why did you go out there?'
>
> "So, Ladies and Gentlemen, this statement made by Mr. Ridley explains why he did what he did, which is went out to this location. It is not being offered for the truth.
>
> "You may continue your answer, sir.

---

[16] We reject defendant's argument the errors require reversal, alone or in combination.

"THE WITNESS: The information we received was a little girl was heard in the night saying, 'No, stop,' and that she was given — she was taking a pregnancy test, an 11-year-old." (Boldface omitted.)

By the time Ridley testified, Victim 1 had already testified that defendant made her take a pregnancy test. During the defense case, a recording of the forensic interview of Victim 1 that was conducted on May 23, 2014, was admitted into evidence at defense request and played for the jury. In the course of that interview, Victim 1 related that the police came to her house because they heard a noise that said "stop." Victim 2 made that noise.

During the prosecutor's cross-examination of defendant, the following took place:

"Q And then [the law enforcement officers] did explain to you why they had actually arrested you, right?

"A Because of accusations.

"Q Made by [Victim 1] and [Victim 2]?

"A Made by someone who called in to CPS.

"Q And who was that person?

"A I don't know. I don't have the report.

"Q So somebody else had called in to CPS and that is why the police had responded on May 17th?

"[DEFENSE COUNSEL]: Objection, lack of personal knowledge.

"THE COURT: Sustained."

The prosecutor briefly changed subjects. This ensued:

"Q Now, part of the reason that someone called CPS is because at night, [Victim 1] could be heard yelling 'No,' and, 'Stop,' from the bedroom?

"[DEFENSE COUNSEL]: Objection, lack of personal knowledge.

"THE COURT: Sustained.

"[PROSECUTOR]: Q [Victim 1] yelled, 'No,' and, 'Stop,' from your bedroom when you were in there at your mom's house, didn't she?

"A Who else was in the bedroom?

"Q Well, at least [Victim 1]. When [Victim 1] was in there, she yelled that.

"A Who was she in there with?

"Q You.

"A And who else?

"Q I don't know. At least those two people.

"A So you are assuming it was just me and her in there when she said that?

"Q I'm asking you if she yelled 'No' and 'Stop' when you were in your bedroom at your mom's house?

"A I can't begin to tell you how many times she said, 'No,' or 'Stop' with her sister, her brother, fighting over something. It's not uncommon for a child to say no or stop in a bedroom.

"Q But she did it at least once when it was just you and her?

"A Not that I remember." (Boldface omitted.)

In its instructions to the jury, the trial court stated that nothing the attorneys said, including their questions, was evidence, and if it sustained an objection, jurors must ignore the question. It also instructed: "During the trial, certain evidence was admitted for a limited purpose. You may consider that evidence only for that purpose and for no other."

2. Analysis

As previously stated, " '[h]earsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing *and that is offered to prove the truth of the matter stated*." (§ 1200, subd. (a), italics added.) As the trial court made

clear, the evidence at issue here was not offered to prove the truth of the matter stated, but rather to explain why Ridley went to defendant's house. It therefore did not constitute hearsay. (See, e.g., *People v. Livingston* (2012) 53 Cal.4th 1145, 1162; *People v. Farley* (2009) 46 Cal.4th 1053, 1106-1107; *People v. Davis* (2005) 36 Cal.4th 510, 550; *People v. Mayfield* (1997) 14 Cal.4th 668, 750-751, overruled on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2.) Likewise, the evidence was not testimonial and did not violate *Crawford*. (See *People v. Spector* (2011) 194 Cal.App.4th 1335, 1370; see also *Crawford*, *supra*, 541 U.S. at pp. 59-60, fn. 9; *Sanchez*, *supra*, 63 Cal.4th at p. 674.)

Because the evidence was not the basis for an expert's opinion, *Sanchez*'s holding concerning the inefficacy of a limiting instruction does not apply. (Compare *People v. Melendez* (2016) 2 Cal.5th 1, 26 with *Sanchez*, *supra*, 63 Cal.4th at p. 684 & *People v. Miller* (2014) 231 Cal.App.4th 1301, 1312.) Defendant fails to convince us the evidence was such that this is one of the rare instances in which there is a great risk jurors will not, or cannot, follow the court's limiting instruction. (See, e.g., *Simmons v. South Carolina* (1994) 512 U.S. 154, 171; *People v. Anderson* (1987) 43 Cal.3d 1104, 1120.)

We further reject any claim the prosecutor committed misconduct by questioning defendant concerning the subject. "Under the federal Constitution, a prosecutor commits misconduct when his or her conduct 'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citation.] Under California law, a prosecutor commits reversible misconduct when 'he or she makes use of "deceptive or reprehensible methods" when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted.' [Citation.] To preserve a claim of prosecutorial misconduct on appeal, 'the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.' [Citation.]" (*People v. Clark* (2016) 63

Cal.4th 522, 576-577.) The objection must be made on the same ground the defendant seeks to raise on appeal. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 894.)

Defendant failed to object on the ground of prosecutorial misconduct at any time during the challenged portion of the prosecutor's cross-examination, quoted *ante*, and the record fails to establish such an objection would have been futile. Accordingly, the claim has been forfeited. (See *People v. Clark*, *supra*, 63 Cal.4th at p. 577; *People v. Hillhouse* (2002) 27 Cal.4th 469, 502.)

Defendant contends that if defense counsel had to lodge further objections to preserve defendant's claims, the failure to do so denied defendant the effective assistance of counsel. We reject this claim as well.

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)

The prosecutor did not commit misconduct. Ridley's testimony was properly admitted. (See *People v. Hines* (1997) 15 Cal.4th 997, 1047; compare *People v. Clark*, *supra*, 63 Cal.4th at p. 577 with *People v. Pitts* (1990) 223 Cal.App.3d 606, 734.) In addition, as we have observed, evidence concerning the voice in the night and Victim 1 being made to take a pregnancy test was already before the jury by the time defendant testified. The prosecutor was entitled to examine defendant on the subjects and, when defense counsel's "lack of personal knowledge" objections were sustained, to attempt to approach the matter in a different manner. "[M]erely eliciting evidence is not

misconduct." (*People v. Scott* (1997) 15 Cal.4th 1188, 1218.) "Moreover, merely asking a question to which an objection is sustained does not itself show misconduct." (*People v. Freeman* (1994) 8 Cal.4th 450, 495.) "As we discern no misconduct on the merits, defendant's ineffective assistance claim fails." (*People v. Thompson* (2010) 49 Cal.4th 79, 121, fn. 14.)

II

EXCLUSION OF DEFENSE EVIDENCE

Defendant contends the trial court erred by excluding two lines of defense evidence — specifically, the murder of defendant's infant son in 1996, and the presence of gang indicia and gang members at defendant's house. Defendant says the exclusion of "these modest but significant circumstantial proffers in a delicate credibility case pos[ed] a real risk of false conviction" (capitalization & boldface omitted), and denied him due process, a fair trial, and the right to present a defense. We conclude the trial court did not err, but if it did, defendant was not prejudiced.[17]

A. Background

Pursuant to section 352, the People moved, in limine, to exclude evidence E.R. strangled defendant's four-month-old son to death with rosary beads in Houston, in 1996, because she believed demons possessed the baby. The People argued the evidence lacked any probative value in that it had no tendency to prove or disprove defendant sexually molested his daughters, and it had a strong tendency to mislead the jury, confuse the issues, and necessitate an undue consumption of time. The People also moved to exclude evidence of third-party culpability, specifically, testimony that the victims' cousins had

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[17] The Attorney General does not contend defendant's claims have been forfeited. Because we agree defendant's claims were sufficiently preserved for appeal (but see *People v. Blacksher* (2011) 52 Cal.4th 769, 821), we do not address his assertion that if the claims are not cognizable, trial counsel's failure to preserve them deprived defendant of the effective assistance of counsel.

gang associations and molested the girls to groom them for prostitution. The People asserted the topics were without any basis and irrelevant, and so moved to exclude them pursuant to sections 350 and 352.

In his recitation of the facts of the case, defendant represented: "Mr. Valdez was not raised in Fresno with his mother. He was raised in Texas with his father. During his divorce, he came to Fresno to get help with his children. His first son was killed my [*sic*] [E.R.] in a very well publized [*sic*] case. He grew more paraniod [*sic*] that harm would come to his children especially because of the circumstances he found his family in. The PAC Unit doctors placed him on Remeron and Sequel [*sic*]. He was very medicated at to [*sic*] time of the police interview." He asserted he should be allowed to present evidence relevant to the credibility of the defense and of the prosecution witnesses.

At the hearing on the motions, defense counsel argued that the murder of his son would explain why defendant was very protective of his children and would never let them out of his sight. It would also explain defendant having stated in his postarrest interview that he remembered being "really messed up" and that anything was possible.[18]

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18 During the interview, the following exchange took place:

> "Q1 [Sergeant Kertson]: So if [the girls] say that you touched their vagina, they're not lying, correct?
>
> "A: If that's what they say. I can't remember everything. I do remember being real messed up when I went to bed.
>
> "Q1: So it's possible that you could have rubbed their vagina under their clothing. It's possible that maybe they – there would have been a – they could have given you a blow job, correct?
>
> "A: It's all possible I guess.
>
> "Q1: Including the sex?
>
> "A: I don't remember the sex, but. . .
>
> "Q1: Possible?

The court granted the People's motion to exclude the evidence, finding what happened in 1996 irrelevant to events that allegedly occurred in 2014. The court reasoned that what happened in 1996 had no bearing on whether defendant formed any intent to touch his children, given defendant's position he did not touch them. The court rejected defense counsel's argument that it explained defendant's having memory lapses and being in mental distress.

Defense counsel also argued that evidence multiple people who were involved in gang activity were in and out of the house, was relevant not for third-party culpability, but to explain why defendant kept his bedroom door locked and the girls in the room with him at night. In addition, defendant suffered depression and mental issues tied to not being able to get the girls out of that environment, and one of the cousins had beaten defendant the day defendant gave his statement to law enforcement. Counsel argued the living environment was part of the defense, and defendant's mental state deteriorated to the point he was on heavy medication and unable to function. The court found defendant's alleged depression was irrelevant, as was his mental state, particularly if it was based on what took place many years earlier in Texas. That there were other persons in the home was "going to be obvious from the evidence," but whether those people were

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"A: Anything's possible.

"Q [Galindo]: Well, these acts have happened. When you got messed up like you said, was it in your bedroom? In your bed? Were you doing this stuff out in the living room? In the car? Outside? Back yard? Would it always be in your bedroom?

"A: I always go to sleep in my room. I don't sleep anywhere else.

"Q: Okay. So it's a very good possibility that it happened in your bedroom like you said.

"A: If that's what they're saying."

gang members was irrelevant. How the environment caused destruction of the family unit also was irrelevant.

B. Analysis

"Evidence possessing any tendency in reason to prove or disprove any disputed material fact is relevant. [Citations.] Evidence is relevant if it 'tends "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]' [Citation.] Evidence is irrelevant, however, if it leads only to speculative inferences. [Citation.]" (*People v. Morrison* (2004) 34 Cal.4th 698, 711; see § 210.)

"The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. [Citation.] We review for abuse of discretion a trial court's rulings on the admissibility of evidence. [Citations.]" (*People v. Benavides* (2005) 35 Cal.4th 69, 90.) When examining for abuse of discretion a decision on admissibility that turns on the relevance of the evidence in question, we "examine[] the underlying determination as to relevance itself. [Citations.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 718.) We will conclude a trial court abused its discretion "only . . . where there is a clear showing the trial court exceeded the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. DeJesus* (1995) 38 Cal.App.4th 1, 32.) We evaluate a trial court's exclusion of proffered evidence based upon the evidence before the court when it made its ruling. (*People v. Rundle*, *supra*, 43 Cal.4th at p. 132, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

We conclude the trial court did not abuse its discretion in excluding evidence of the 1996 murder of defendant's infant son or of gang members and indicia at the house. Defendant was permitted to present evidence of the number of people in the house and the fact some of them were males. That some may have had gang affiliations added little or nothing to the defense theory of why defendant might seem overly protective of his

daughters. (See *People v. Gonzales* (2012) 54 Cal.4th 1234, 1260-1261.) Similarly, defendant was permitted to present evidence of the medications he was taking at the time of his arrest, and their effects on him.[19] Why he allegedly was depressed and having personal problems had no tendency in reason to prove or disprove whether he sexually abused his daughters. (See *People v. Benavides*, *supra*, 35 Cal.4th at pp. 94-95; *People v. DeJesus*, *supra*, 38 Cal.App.4th at pp. 32-33.) The notion the murder of his son in 1996 had some tendency in reason to explain why he told detectives anything is possible, is nothing more than speculation, particularly when defendant's answers in that regard are read in context.

In light of the foregoing, we find no state law error. Nor do we find a deprivation of defendant's federal constitutional rights.

"The United States Constitution guarantees criminal defendants a meaningful opportunity to present a defense. [Citation.] Evidence that falls short of exonerating a defendant may still be critical to a defense. [Citation.]" (*People v. Cash* (2002) 28 Cal.4th 703, 727.) Nevertheless, "the Constitution permits judges 'to exclude evidence that is "repetitive . . . , only marginally relevant" or poses an undue risk of "harassment, prejudice, [or] confusion of the issues." ' [Citations.]" (*Holmes v. South Carolina* (2006) 547 U.S. 319, 326-327.)

"As a general matter, the '[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense.' [Citations.] Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, '[t]he trial court's ruling was an error of law merely; there was no refusal to

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19 Nothing in the record suggests defendant would have been prevented from supporting his own testimony in this regard with, for example, records of his hospitalization.

allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense.' [Citation.] Accordingly, the proper standard of review is that announced in *People v. Watson*[, *supra*,] 46 Cal.2d [at page] 836, and not the stricter beyond-a-reasonable-doubt standard reserved for errors of constitutional dimension (*Chapman v. California* (1967) 386 U.S. 18, 24)." (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)

Here, defendant clearly was not precluded from presenting his defense. That the trial court exercised its discretionary power to exclude some evidence does not mean there was any constitutional infirmity in its rulings, as they were neither arbitrary nor constituted anything close to a blanket exclusion of any given subject. (See *People v. Hart* (1999) 20 Cal.4th 546, 607.) Accordingly, were we to find error (which we do not), we would conclude any possible relevance was so marginal that (1) the trial court would have acted well within its discretion in excluding the evidence pursuant to section 352, and (2) it is not reasonably probable defendant would have obtained a more favorable result had the evidence been admitted.

III

DEFENDANT'S STATEMENT TO POLICE

Defendant contends the trial court erred in denying his motion to exclude his statement to police. He claims the prosecution failed to demonstrate (1) valid waivers under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and (2) the statement was voluntary. We reject the first claim, find the second claim forfeited, and further conclude defendant has not shown trial counsel was ineffective in that regard.

A. Background

Defendant objected, in limine, to the playing of the recording of his postarrest interview. He also requested a section 402 hearing with respect to *Miranda*. He claimed he was heavily medicated and experiencing posttraumatic stress disorder and emotional distress, and any waiver of rights was not knowing or voluntary. The trial court

subsequently stated it would review the recording and transcript of the interview, and that the issues were *Miranda* and whether defendant was able to make a knowing and voluntary waiver of his rights.

The court and counsel viewed approximately the first 10 minutes of the recorded interview.[20] Defense counsel argued she could not hear defendant respond when asked if he understood his rights, defendant stated he was on medications, and the detective acknowledged the room was cold. She asserted defendant's affect was "completely flat," he stated he slept a lot as a result of his medication, he mentioned he had a hernia, and he seemed "somewhat disoriented." The prosecutor responded that defendant's understanding of his rights was "fairly clear" and it was apparent he understood what was going on.

The court acknowledged defendant told detectives he was on medication, and he gave the names of his medications, although not quantities or dosages. In addition, defendant indicated the medications made him drowsy. The court noted defendant was soft-spoken, but found it "pretty clear" he was answering affirmatively with respect to the *Miranda* warnings, not only making sounds of affirmation, but also sometimes nodding his head affirmatively. In addition, while there was a reference to the room being cold, it did not appear that was done to put defendant at a disadvantage, but rather, as stated by a detective, it was done to keep the officers awake. The parties agreed deputies were called to defendant's house at around 4:00 p.m., defendant was arrested around 7:00 p.m., and the interview began at 11:59 p.m. The court ruled:

> "So the issue is whether the defendant waived the rights that were provided to him by law enforcement. The Court finds that based upon the recorded interview, which basically allows the Court and counsel to be present

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20 The court stated it had stopped the playing of the recording about 10 minutes after the portion concerning the *Miranda* advisement and waivers, because it felt it was getting beyond the issue raised by the motion, namely, whether *Miranda* rights were given and whether there was a waiver of any rights.

> effectively during the reading of the rights, and to see and hear the defendant's responses, the Court is satisfied . . . that the rights were given and that there was a waiver of each of those rights. The Court finds that the defendant had the capacity to waive his Miranda rights. There is nothing suggesting that he is of low intelligence. There is nothing suggesting he was under the influence of any drugs or alcohol at the time. There is nothing suggesting he was in any pain or that he was not fluent in the English language at the time of the advisement, because the advisement was given in the English language.
>
> "So the defendant's statement as contained in the . . . recorded video may be offered into evidence. It does not violate Miranda."

B. <u>Analysis</u>

"[W]hen an individual is taken into custody . . . and is subjected to questioning, . . . the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. . . . [U]nless and until such warnings and waiver [of rights] are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." (*Miranda*, *supra*, 384 U.S. at pp. 478-479, fn. omitted.) Although there is no " 'precise formulation' " in which the warnings must be given, they must " 'reasonably "conve[y] to [a suspect] his rights as required by *Miranda*." ' [Citation.]" (*Florida v. Powell* (2010) 559 U.S. 50, 60.)

"No particular manner or form of *Miranda* waiver is required, and a waiver may be implied from a defendant's words and actions. [Citations.] In determining the validity of a *Miranda* waiver, courts look to whether it was free from coercion or deception, and whether it was ' "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." ' [Citation.] Both aspects are tested against the totality of circumstances in each case, keeping in mind the particular background, experience and conduct of the accused. [Citation.]" (*People v.*

Davis (2009) 46 Cal.4th 539, 585-586.) In reviewing a trial court's ruling a defendant voluntarily and knowingly waived his or her *Miranda* rights, " 'we accept the trial court's resolution of disputed facts and inferences, and its evaluation of credibility, if supported by substantial evidence. [Citation.] Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we " 'give great weight to the considered conclusions' of a lower court that has previously reviewed the same evidence." [Citations.]' " (*People v. Whitson, supra,* 17 Cal.4th at p. 248.) The prosecution bears the burden of establishing a valid waiver by a preponderance of the evidence. (*Ibid*.)

We have reviewed the video recording and transcript of the interview, and conclude the trial court did not err. The following took place at the outset of the interview:

> "Q [Galindo]: Right there. I know it's cold in here, man. I'm sorry.
>
> "A [defendant]: Yeah.
>
> "Q: Try to keep us awake, you know what I mean? Ah, what I do is, um, I record my stuff so I don't have to be writing stuff down and, ah, it's just a lot easier, so that's what this is, okay?
>
> "A: Mm-hm.
>
> "Q: All right. It's, ah, May 17. Ah, time is 1159 hours. My name is Detective Juan Galindo. With me is detective – er, Sergeant Kertson. Ah, Case number is gonna be 14-7925 and, um, we'll be talking to – your name?
>
> "A: Ramiro Valdez.
>
> "Q: Mr. Valdez, what's your, ah, birthday?
>
> "A: 2/14/74.
>
> "Q: Okay. Mr. Valdez, um, as you're aware, you were taken into custody. You were placed under arrest and transported over

to headquarters, which is where you're at right now. So with that I can give you Miranda warning. Um, if you can give me a verbal so I can – so the machine can pick it up. Ah, just yes or no to the questions I'm about to ask you. You have the right to remain silent. Do you understand?

"A: Yeah.

"Q: Okay. Anything you say, ah, may be used against you in court. Do you understand?

"A: Yeah.

"Q: You have the right to an attorney prior to and during any questioning, do you understand?

"A: Mm-hm.

"Q: If you cannot afford an attorney, one will be appointed for you before questioning. Do you understand?

"A: Mm-hm.

"Q: Okay. Do you want to talk about what happened? Why you're in custody? Why you were arrested?

"A: Nobody told me why.

"Q: Yeah, okay. Do you want to talk about it now? Do you want to talk to me about it?

"A: About why I'm here?

"Q: Yeah.

"A: 'Cause I have a radio.

"Q: Ah, 'cause you have what?

"A: 'Cause I had the music on and the kids were outside.

"Q: Okay, well so let's go ahead and talk then. . . ."

Later in the interview, Galindo asked defendant how he was feeling, whether he was on any kind of medication, and if he took any medication. Defendant responded

affirmatively, and said he took Seroquel and Remeron. He explained the Seroquel was mainly for hearing voices. Asked if he had any other medical problems, defendant said he had a hernia.

Galindo asked why defendant's children had been missing school. Defendant explained that he took his Seroquel in the morning and evening, and then Remeron, and both caused drowsiness and "knock[ed] [him] out." Galindo inquired what time defendant had taken his medication that day; defendant responded that he took it "kinda early, about 6:00," and the deputies arrived around 7:00 p.m. Defendant denied that he was drinking. He said that sometimes he would drink a beer and the time would go by and he would take his pill, but that was when he was already going to bed.

In light of the foregoing, coupled with our viewing of the actual recording of the interview, we have no problem concluding defendant knowingly, intelligently, and voluntarily waived his rights. He expressly acknowledged, verbally or by affirmatively nodding his head or both, that he understood each right. The record does not suggest he had any trouble with the English language. He showed no reluctance to talk. Although his affect is somewhat flat, nothing suggests he was drowsy from medication taken approximately six hours earlier or from the late hour, or that his judgment was clouded or impaired. Nothing suggests defendant lacked sufficient intelligence to understand his rights or the consequences of waiving them. That he launched into a conversation about why he was there, rather than expressly agreeing to talk, does not indicate he was confused so as to render his waivers invalid.

Our independent review of the record leads us to conclude the trial court did not err. Defendant knowingly, voluntarily, and intelligently waived his constitutional rights. (See *People v. Whitson*, *supra*, 17 Cal.4th at pp. 248-250; see also *People v. Debouver* (2016) 1 Cal.App.5th 972, 978.)

Defendant further claims the prosecution failed to show his admissions in the interview were voluntary. He claims the interrogation was "aggressive and tricky," and

involved detectives calling defendant a liar or deceitful around 60 times. Defendant did not seek exclusion at trial on the ground of involuntariness, however, and thereby forfeited the argument. (*People v. Tully* (2012) 54 Cal.4th 952, 992; *People v. Michaels* (2002) 28 Cal.4th 486, 511-512.) This conclusion is followed, almost inevitably, by a claim of ineffective assistance of counsel. We reject it, as well.

"Under the due process clauses of both the Fourteenth Amendment to the United States Constitution and article I, sections 7 and 15, of the California Constitution, these principles are established: an involuntary confession or admission is inadmissible; a statement is involuntary if it is the product of coercion or, more generally, 'overreaching'; involuntariness requires coercive activity on the part of the state or its agents; and such activity must be, as it were, the 'proximate cause' of the statement in question, and not merely a cause in fact. [Citation.]" (*People v. Mickey* (1991) 54 Cal.3d 612, 647.)

"Under both state and federal law, courts apply a 'totality of circumstances' test to determine the voluntariness of a confession. [Citations.] Among the factors to be considered are ' "the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health." ' [Citation.]" (*People v. Massie* (1998) 19 Cal.4th 550, 576.) "In determining whether a confession was voluntary, '[t]he question is whether defendant's choice to confess was not "essentially free" because his will was overborne.' [Citation.]" (*Ibid.*) "Whether the defendant lost his free will and made involuntary statements does not rest on any one fact, however significant it may seem." (*People v. DePriest*, *supra*, 42 Cal.4th at pp. 34-35.)

"The business of police detectives is investigation, and they may elicit incriminating information from a suspect by any legal means. '[A]lthough adversarial balance, or rough equality, may be the norm that dictates trial procedures, it has never

been the norm that dictates the rules of investigation and the gathering of proof.' [Citation.] 'The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.' [Citation.]" (*People v. Jones* (1998) 17 Cal.4th 279, 297-298.) Had defense counsel challenged defendant's statement as being involuntary, it would have been the People's burden to prove voluntariness by a preponderance of the evidence. (*People v. Williams* (1997) 16 Cal.4th 635, 659; *People v. Lucas* (1995) 12 Cal.4th 415, 442.)

The record on appeal does not establish involuntariness as a matter of law. (See *People v. Hensley* (2014) 59 Cal.4th 788, 814; *People v. Williams* (2010) 49 Cal.4th 405, 444-445; *People v. Carrington* (2009) 47 Cal.4th 145, 175.) Nor does it contain an explanation for why defense counsel failed to raise the issue below. Even assuming we might doubt a satisfactory explanation could be provided, we are unable to conclude it could not.[21] Accordingly, defendant's claim fails. (See *People v. Bell* (1989) 49 Cal.3d 502, 546.)

IV

CUMULATIVE PREJUDICE

Defendant claims the "cumulative effect of the errors" he has asserted deprived him of a fair trial by an impartial jury, and so require reversal of the judgment.[22] "To the extent there are instances in which we have found error or assumed its existence, we have

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[21] That counsel moved to exclude defendant's statements to detectives on *Miranda* grounds does not automatically mean counsel could not rationally choose to forego raising a claim of involuntariness. (See *People v. Lucas*, *supra*, 12 Cal.4th at pp. 437, 441.)

[22] To the extent we have not separately or expressly addressed any point raised by defendant, we have considered and rejected it. (See *People v. Berryman* (1993) 6 Cal.4th 1048, 1110-1111, fn. 33, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

concluded no prejudice resulted. We do not find reversible error by considering the claims cumulatively." (*People v. Chism* (2014) 58 Cal.4th 1266, 1309; see *People v. Zaragoza* (2016) 1 Cal.5th 21, 60.)

DISPOSITION

The judgment is affirmed.

_____
DETJEN, Acting P.J.

WE CONCUR:

_____
MEEHAN, J.

_____
DESANTOS, J.